

Prepared Remarks of Frank Miller, Esq.

**Before the United States Senate
Committee on Indian Affairs**

June 9, 1999

Good morning. Chairman Campbell, Vice Chairman Inouye, members of the Committee, my name is Frank Miller. Thank you for this opportunity to testify on the issue of the Internet and how it may affect Indian gaming.

This morning, I would like to address three specific issues: (1) tribal gaming and the current use of technology by Native Americans; (2) the Kyl Internet gambling bill and its impact on tribal gaming operations; and (3) the broader issue of [whether it is possible](#) to regulate technologically-assisted gaming.

Given my previous professional experience, I believe I am particularly well-suited to speak to these issues. Prior to my joining the private sector in 1997, I was the director of the Washington State Gambling Commission, a position I held for six years. Washington State has one of the largest gambling enforcement commissions in the country, trailing only Nevada's and New Jersey's in size. In my capacity as the chief gambling regulator for the state, I was responsible for overseeing charitable, commercial, and class III tribal gaming operations. During my tenure, I also had the privilege of negotiating nineteen (19) tribal-state gaming compacts. In addition, I served as president and board member of the North American Gaming Regulators Association in 1994 and 1995.

Mr. Chairman, I have closely monitored the progress of internet gaming legislation in [both the 105th and 106th Congresses](#). I am very concerned that critical legislative decisions are being made

based on inaccurate or incomplete information. I believe sound policy can only be developed by having all of the facts presented to decision-makers in a fair and unbiased way - regardless of whether one is in favor of or opposed to the application of 21st century technology to an activity such as gaming.

Use of Technology in Tribal Gaming

A. Current Law and the Need for Telecommunications In Tribal Gaming

When examining the issue of how technology affects tribal gaming operations, one has to begin with the proposition that most Indian reservations (and, therefore, Indian casinos) are located in areas where customer traffic is relatively light. This causes a circularity problem. Without large numbers of customers coming through the door, tribes cannot offer sizable jackpots - and without sizeable jackpots, it becomes much more difficult to attract and retain customers. For this very reason, a number of state governments have banded together in the Powerball lottery alliance. One of the few ways for Indian gaming to avoid this catch-22 is to allow individual tribes to link specific facets of their wagering operations the way state governments do - in essence, to create multi-tribe games operated for customers from various reservations, all participating in one big game with a much larger pay-out.

When Congress enacted the Indian Gaming Regulatory Act in 1988, it did so knowing that not all tribal casinos would be able to drive economic development, given their remote location. As such, IGRA anticipated that tribes should be able to join forces in order to effectively compete against traditional gaming. It was the intent of the Congress for tribes to be able to utilize the latest technology to provide gaming services to markets that they would otherwise never be able to reach. Accordingly, IGRA authorized Native American gaming enterprises to use telecommunications

technology to provide class II gaming products to a broader audience.

The term 'class II gaming' means . . . the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith)"

Moreover, as the legislative history accompanying IGRA explains:

[T]he Committee intends . . . that tribes have maximum flexibility to utilize games such as bingo and lotto for tribal economic development. The Committee specifically rejects any inference that tribes should restrict class II games to existing games, sizes, levels of participation, or current technology. The Committee intends that tribes be given every opportunity to take advantage of modern methods of conducting class II games and the language regarding technology is designed to provide maximum flexibility. In this regard, the Committee recognizes that tribes may wish to join other tribes to coordinate their class II operations and thereby enhance the potential of increasing revenues. For example, linking participant players at various reservations in the same or different states, by means of telephone, cable, television, or satellite may be a reasonable approach for tribes to take.

While this august body cannot be faulted for its failure to predict the development of the internet as a means of mass communication, the legislative history of IGRA clearly allows for the use of such technology to consolidate gambling activities among several tribes.

B. Satellite Bingo

Let me give you an example of how this technology is currently being used. Under the technology provision of IGRA, one vendor provides services for tribes to operate class II bingo games in

which more than 60 tribes participate. Each of the tribes is linked via satellite and/or telephone lines to a central service location on Indian lands where wagers are pooled together using a computer server. This pooling of bets allows each tribe to provide stakes that could not be offered if the game was restricted only to those customers who could go to a single location. The increased jackpots make the games more attractive to consumers, and encourage more people to travel to the reservation to play bingo with others who are physically located on different tribal lands. This operation provides over \$100 million each year to the tribes that participate in the multi-tribe bingo games, which are then used for local governmental operations and economic development. The additional consumer traffic on the reservations also generates significant revenues for tribes separate from gaming proceeds.

In the example discussed above, all relevant communications travel from one regulated jurisdiction to another, with both ends of the data line being monitored by federal as well as tribal authorities. There are other class II examples which utilize different business models. All, however, are subject to regulation by both tribal authorities and the National Indian Gaming Commission.

As you can see, the technology provision of IGRA has created opportunity for remote tribes where none would otherwise exist. While tribes like the Mashantucket Pequot in Connecticut have the good fortune to be located near large population centers, that is unfortunately the exception rather than the rule. Most tribes are so remote, they cannot generate the minimum customer traffic necessary to support capital investment and offer more attractive games. However, the use of technology allows many tribes to bridge the distance gap, become successful, and compete with other gaming operations.

Indeed, the National Gambling Impact Study Commission has validated this finding. Last week, the

Commission noted that linked class II games contribute significantly to the welfare of the tribes, and as such, should be allowed to continue.

The Commission recommends that Congress should adopt no law altering the right of Tribes to use existing telephone technology to link bingo games between Indian reservations when such forms of technology are used in conjunction with the playing of Class II bingo games as defined under the Indian Gaming Regulatory Act.

C. The Kyl Bill's Impact on Current Law

What is particularly disconcerting about the Internet Gambling Prohibition Act (S. 692) sponsored by Senator Jon Kyl (R-AZ), is that this legislation would effectively amend IGRA, eliminate the technology provision, and put an end to almost every type of technologically-assisted gaming that has provided great benefits to tribes. This is because the Kyl gambling bill does not merely address in-home internet gambling; if enacted in its present form, S. 692 would impact all gaming where computer technology is utilized to span geographic distances. Native American enterprises would be prohibited from using any form of telecommunications technology to increase player participation or facilitate the transmission of gambling information on or between tribal lands, even though the use of such technology is specifically authorized by IGRA. As such, it would substantially modify the Indian Gaming Regulatory Act.

II. S. 692 and Tribal Gaming

A. A Broad Prohibition

By all appearances, the Internet Gambling Prohibition Act is intended to target offshore operators who provide millions of consumers with casino-style gambling or the opportunity to wager on sporting events using the internet as the primary means of communication. As I said, however, it has been drafted to include other forms of technology besides the internet. Linkages via satellite, dedicated telephone line, dial-up networking, or closed-loop internet-like data transfers would all

fall within the scope of the Kyl legislation, since each utilizes computer server technology to manage data traffic.

Besides being overly broad, S. 692 would have a disproportionate impact on tribal operations.

Whether by co-mission or omission, the Internet Gambling Prohibition Act would not only supercede IGRA's technology provision, it would impose new requirements on tribes that depend on class II gaming for their economic self-sufficiency.

B. Imposition of New Requirements for Class II Gaming

As you know, IGRA sets forth standards and requirements for tribes wishing to offer gaming activities as a means of economic development.

Class II games may be offered by tribes without a tribal-state compact in place. Under the Kyl bill, however, those tribes that wish to offer technologically-assisted class II gaming or merely use data technology to transfer gambling information from one regulated environment to another would be required to have a compact in place or risk prosecution by federal and state law enforcement agencies. This is a radical departure from current law, since it would: (1) mandate that tribes enter into tribal-state compacts for some forms of class II gaming; and (2) authorize state attorneys-general to enforce state gaming laws on tribal lands.

C. Subordination of the Tribes to State Governments and the Private Sector

Equally important for the purposes of this discussion, S. 692 would seem to subordinate the importance of tribal authority to states and in some cases, even treats some private sector gaming operations more favorably.

The Kyl bill would amend the current Wire Act to impose a broadly-worded prohibition of technologically-enhanced gambling. In addition to the prohibition, however, S. 692 contains a number of carve-outs for other forms of internet gambling. For example, state lotteries could utilize the internet or other networks to transmit gambling information. Reaffirming current law, horse tracks would be permitted to continue accepting telephone wagers as well as in-home wagers made via cable television equipment. It would even expand the scope of legal in-home gaming by changing current law to allow dog racing and jai alai to be simulcast via the internet and permit consumers to place bets on these contests from their own homes.

At the same time, S. 692 would preclude all class II tribal gaming that utilizes data transmission technology unless a compact is in place. And even that exception to the general prohibition would only apply to gaming that takes place in facilities open to the public. Tribes would be precluded from accepting wagers from the gambler's home.

While I reserve judgment on the propriety of in-home wagering, it is fair to say that Native American gaming enterprises should be given the same opportunities as those sponsored by state governments or private sector businesses. To do otherwise undermines the concept of tribal sovereignty. Since the current version of S. 692 does, in fact, provide greater opportunities for non-tribal gaming (e.g., horse, dog, and jai alai wagering, state lotteries, etc.) than tribal gaming, one has to question its impact on the delicate balance set forth in IGRA.

III. The Policy of Regulation vs. Prohibition

One of the fundamental claims made by the proponents of S. 692 is that interactive gaming is impossible to regulate - and in the absence of regulation, it should be prohibited. With all due candor, that is not exactly accurate. While interactive wagering presents some unique regulatory

challenges, the obstacles are by no means insurmountable.

With respect to the regulation of remote gaming offered by tribes and the question of integrity of regulation, we already have a solid analogy for comparison. In New York and Pennsylvania, account-based telephone wagering on horse races has been permitted for nearly a quarter-century. Moreover, since 1993, the Commonwealth of Pennsylvania has permitted the acceptance of telephone wagers from out-of-state customers. Thus, someone living in Hawaii could have picked up the telephone on Saturday and placed a bet on *Charismatic* to win the Belmont Stakes. Both Pennsylvania and New York, which profit from remote and interactive wagering activity, also regulate the telephone betting operations without significant opposition or incident. There is no reason why the same dynamic cannot apply to tribal gaming.

The use of new technology to provide alternative forms of remote wagering has little impact on “regulatability.” So long as there is a physical location and hardware that can be inspected by tribal gaming regulators, the National Indian Gaming Commission, or any other regulatory body, integrity and consumer protection can be accomplished. In short, the regulation of tribally operated interactive or internet gaming can be done in the exact same manner that land-based gaming is regulated.

Mr. Chairman, if you will, I would like to address the broader policy of banning internet gaming for just a moment. As I said earlier, I reserve judgement on in-home wagering. However, given the fact that in-home wagering would continue, and *actually expand* under the Kyl bill (in-home wagers on horse and dog races and other pari-mutuel games would be permitted), the question is whether it is sound policy to ban other types of gaming.

As I understand how the internet operates, its framework makes prohibitions difficult - if not impossible - to enforce. Even the National Gambling Impact Study Commission has noted that the Kyl bill would be ineffective in keeping Americans from searching out and accessing gaming sites online. If that is the case, it seems to me that the better, albeit more difficult, approach is to regulate such activity.

Last year, I traveled to Australia where I met with gaming regulators who recently finalized a comprehensive regulatory program for internet gambling. The model allows for strict regulation, strong consumer protections, and taxation by individual states.

While the Australian model appears viable, I believe even stronger measures can and should be taken in the United States in order to screen out compulsive gamblers and minors from the system, guarantee the collection of taxes from bettors and operators, and ensure that games offered are well-regulated and fair.

If, however, a prohibition is enacted, it will only drive gaming operators off-shore, where enforcement of age-restrictions and other regulations are far less likely to be in place, and are virtually impossible for U.S. authorities to enforce (especially when sovereign governments have already set their own gaming standards, which in some cases, are more relaxed than U.S. regulation). As such, passage of Senator Kyl's Internet Gambling Prohibition Act may have the unintended effect of actually increasing the exposure of children and compulsive gamblers to on-line wagering, while creating a black market that benefits off-shore companies at the expense of the domestic industry, Native American enterprises, and the U.S. economy.

Ideally, a regulatory framework in the United States would be a partnership between the states,

Native American tribes, and the federal government, and **would be** paid for with industry profits. Regulation would have to include strict licensing requirements, permanent U.S. siting requirements to ensure a jurisdictional nexus and U.S. control, appropriate state, tribal and federal limitations, **inspection of hardware and software**, and complete accountability through advanced auditing technology. Consumer protection would be achieved and taxes would be collected. To address minor access, gaming operators could be required to strictly control participation through a comprehensive verification system that includes a mandatory waiting period to establish the bettor's identity. Such a regulatory regime would be funded entirely by the operators and would not cost taxpayers a dime.

Technology currently exists to extensively and thoroughly audit on-line casino style games. Auditors would be able to make unannounced "inspections" of virtual games electronically, without the casino ever knowing. From a regulator's perspective, such spot checks are invaluable in the fight against corruption. As one Australian regulator told me last year, "Virtual gaming will be *easier* to regulate than the gaming which exists today." I could not agree more.

Given the reach of the internet, and its international character, I believe a comprehensive regulatory program is a necessity. The passage of the Kyl bill to prohibit **some forms of** internet gaming, will only serve to create a domestic black market - a market that may be beyond the reach of American legislators and regulators, but not the vulnerable public. If S. 692 is adopted, the end result will be a statute that is impossible to enforce, and ineffective in preventing Americans from accessing gaming sites.

IV. Conclusion

Mr. Chairman, Native American gaming enterprises have been utilizing technology to enhance

their products for years, with few - if any - problems in terms of regulation. As technology continues to develop, the internet and other forms of data transfer may be further harnessed for the benefit of the tribes, and the nation as a whole.

However, S. 692 poses a threat to tribes. The collateral impact of the Kyl bill would end the use of technology by gaming tribes, effectively amend IGRA, and extend state jurisdiction onto tribal lands. These consequences should clearly demonstrate that policies regarding tribal gaming are best handled by experts in the field - you and the members and staff of this Committee.

Finally, one has to question the broader policies that the Kyl bill attempts to advance. Regardless of whether one favors or abhors gambling, the internet is a vehicle for personal choice. If it cannot be stopped, the government has the responsibility to ensure that consumers are protected. Maybe that requires regulation, maybe it is merely *caveat emptor* or "let the buyer beware." But to merely declare a partial - yet unenforceable - prohibition does a disservice to the general public.

Chairman Campbell, that is the extent of my prepared remarks. I would be happy to answer any questions that you or other members of the Committee may have.